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JAMES R. BROWNING,

No. 9 ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

UNITED STATES OF AMERICA, PLAINTIFF,

v.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA AND FLORIDA, DEFENDANTS.

Brief of Attorney General of Florida, Amicus Curiae, in Support of the Petitions for Rehearing Filed Herein by the States of Louisiana, Mississippi, and Alabama

In Which Eleven States Named in the Appendix Join Through Their Attorneys General

RICHARD W. ERVIN
Attorney General
State of Florida

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No. 10 ORIGINAL

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In Which Eleven States Named in the Appendix Join Through Their Attorneys General

ARGUMENT

May it please the Court:

Acting pursuant to Rule 42(4) of the Rules of this Honorable Court, this brief amicus curiae is submitted by the Attorney General of the State of Florida, acting for and on behalf of that State, in support of the petitions for rehearing respectively filed herein by the States of Louisiana, Mississippi and Alabama. Other states, eleven in number, represented by their Attorneys General, have joined in this brief, as shown in the Appendix.

The Court was divided on the great historical and constitutional questions dealt with in *United States v. California*, 332 U.S. 19, and in effect invited

the Congress to express a policy thereon in pursuance of its constitutional powers.

The Congress, pressed by the States, accepted that invitation. In doing so, the Congress adopted as the law what the Court said its predecessors had believed to be the meaning of the rule originally announced in *Pollard's Lessee v. Hagan*, 3 How. 212, 44 U.S. 212. This Court, in *United States v. California*, 332 U.S. 19, 36, said:

> "As previously stated this Court has followed and re-asserted the basic doctrine of the Pollard case many times. And in doing so it has used language strong enough to indicate that the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction; whether inland or not."

Indeed, the Congress emphasized its adherence to what the Court considered the view of its predecessors through majority and minority reports of its committees. Moreover, Congress made this meaning very clear by the distinction it drew between lands submerged beneath territorial waters, dealt with in the Submerged Lands Act, *67 Stat. 29 43 U.S.C. s. 1301-1315*, and those beneath so-called extra territorial waters dealt with in the Outer Continental Shelf Lands Act, *67 Stat. 462, 43 U.S.C. s. 1331-1343*.

The act last mentioned was based upon the new

concept first announced by our Nation in Presidential Proclamation No. 2667, *September 28, 1945, 10 Fed. Reg. 12303, 59 Stat. 884,* and Executive Order No. 9633, *10 Fed. Reg. 12305.*

In the Submerged Lands Act, the Congress limited the boundaries of the states to the mutually established United States-Canadian boundary in the Great Lakes and to the traditionally recognized three mile or one league limit in the Atlantic and Pacific Oceans. Not so in the Gulf of Mexico, for the Congress, aware then as earlier Congresses were when the Gulf Coast states were admitted to the Union, of the different geography and history of the region, limited state boundaries to three leagues from coast. This three league measurement was used by Spain and France, first claimants of the area by right of discovery, though a different measure was asserted by England during its brief tenure of a portion of the region. This three league measurement was first used by the United States in marking the limits of Louisiana, then by the Republic of Texas in its boundary Act of 1836, then by the United States in its treaty with Mexico, Guadalupe Hidalgo in 1848, and then by Florida in 1868.

It seems abundantly clear that the United States did not limit its national boundaries to three miles in the Gulf of Mexico; otherwise, it could not have established an international boundary with Spain in 1819, with Mexico in 1828, with Texas in 1838, or with Mexico again in 1848, at three leagues. It seems

abundantly clear that the territorial waters of the United States must extend three leagues into the Gulf of Mexico to support the conclusion of the Court that Florida and Texas have such boundaries. It seems abundantly clear also that the Congress in the Submerged Lands Act expressed its adherence to the long recognized doctrine that there was no federal belt surrounding the continental United States during the formative days of our federation and, indeed, there is none now. For the rightful claims of our nation to the outer continental shelf is not based upon territorial claims but upon proximity—these are rights which appertain.

Hence, it is submitted with deference that the conclusions that Congress said or meant that there should be territorial areas of three leagues off Texas and Florida and only three miles off Alabama, Louisiana and Mississippi is not justified by the history of the region. Or, if the conclusion is that the United States does indeed have a territorial limit of three leagues off the coast of Alabama, Louisiana and Mississippi but that these states have their limits curtailed, then it is said again with deference, that the constitutional history of our nation does not support the conclusion. Nor does it seem reasonable that the Congress intended that one set of laws should govern that part of the nation which lies within a three mile limit, another—that extra territorial area beginning three leagues out which is dealt with in the Outer Continental Shelf Lands Act, but that Congress left

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unprovided for the territorial area of two leagues seaward of state limits but landward of national limits and the beginning of the area dealt with in the Outer Continental Shelf Lands Act.

The mineral treasures supposed to be involved in this litigation are not of primary concern. With an annual Federal budget of Eighty Billion Dollars, even the reported Three Hundred Million Dollars accumulated since this litigation commenced in 1950 represents the spending of a day or two at the most. Of transcending importance is the great principle that we are one mighty nation composed of many states with many attributes of sovereignty though yielding at last to the pronouncements of this Court established by the government to which the states had ceded other important attributes of sovereignty.

As Mr. Justice Frankfurter said in the concurring opinion joined in by Messrs. Justices Brennan, Whittaker and Stewart, "In these matters we are dealing with great acts of state, not with fine writing in an insurance policy." It is respectfully submitted that this guiding principle is applicable also in determining the meaning of Congress when Alabama, Louisiana and Mississippi were admitted to the Union, and the meaning of Congress in 1953 when it passed the Submerged Lands Act, that when this principle is applied, the force of the statement by Mr. Justice Black as to the "fundamental unfairness *** completely incompatable with the kind of justice and fairness that Congress wanted to bring about" stands in bold

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relief. And when this principle, that "we are dealing with great acts of state" is fully faced, the force of the statements made by Mr. Justice Douglas are overwhelming:

> "If the southeast corner of Texas was three leagues off shore, it is difficult for me to see how the southwest corner of Louisiana was not at the same point.
>
> " * * * The words 'to the Gulf of Mexico * * * including all of the islands' within certain designated leagues of the shore can reasonably mean that the 'boundary line' is marked by the islands. There is difficulty in that construction. Yet it is for me no more difficult than the method we use to give Texas a territorial claim in the same belt. All the states on the Gulf should be given the same benefit of the doubts that have been resolved in favor of Texas * * * In that posture, the claims of each of the other Gulf states which have gone 'long unchallenged,' as shown by Mr. Justice Black, are as clear as those of Texas."

It is respectfully submitted that Alabama, Louisiana and Mississippi are entitled to the rehearing and the relief they seek.

RICHARD W. ERVIN
Attorney General
State of Florida

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APPENDIX

The following named Attorneys General, acting for and on behalf of their respective states, give their support to and join in the foregoing brief amicus curiae:

BRUCE BENNETT
Attorney General
State of Arkansas

DUKE W. DUNBAR
Attorney General
State of Colorado

EUGENE COOK
Attorney General
State of Georgia

EDWIN K. STEEN
Attorney General
State of Indiana

HILTON A. DICKSON, JR.
Attorney General
State of New Mexico

THOMAS WADE BURTON
Attorney General
State of North Carolina

MAC Q. WILLIAMSON
Attorney General
State of Oklahoma

DANIEL R. McLEOD
Attorney General
State of South Carolina

GEORGE F. McCANLESS
Attorney General
State of Tennessee

WALTER L. BUDGE
Attorney General
State of Utah

A. S. HARRISON, JR.
Attorney General
Commonwealth of Virginia

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PROOF OF SERVICE

I, Richard W. Ervin, Attorney General of the State of Florida, who, on behalf of said State, files the foregoing brief amicus curiae, and a member of the Bar of the Supreme Court of the United States, certify that the required number of copies of said brief have been served on the Attorney General and Solicitor General of the United States, respectfully, by sending said copies through the United States mail, postage prepaid, addressed to them at their offices in the Department of Justice Building, Washington, D.C., and I further certify that copies have also been served upon the Attorneys General of each of the defendant states herein, by sending same to them through the United States mail, postage prepaid, to their official addresses.

September_____, 1960.

RICHARD W. ERVIN
Attorney General
State of Florida

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